SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

Nos. 73-321 and 73-385

In the Supreme Court of the United States

OCTOBER TERM, 1973

KENNETH L. MUSGRAVE, PETITIONER

v.

UNITED STATES OF AMERICA

MARSHALL WOMACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of Texas, petitioner Musgrave was convicted on four counts and petitioner Womack on three counts charging conspiratorial and substantive offenses pertaining to the defrauding of a federally insured savings and loan association, in violation of 18 U.S.C. 371, 657 and 1006.[1] Musgrave was given

[1] Petitioners had been previously tried and convicted separately. Musgrave's conviction was reversed on appeal because of faulty

concurrent sentences of five years' imprisonment on each count upon which he was convicted and Womack concurrent sentences of three years' imprisonment. The court of appeals affirmed (Musgrave Pet. App. A; Womack Pet. App. B). Petitions for rehearing were denied.

Both petitioners contend that the trial court committed prejudicial error in its instruction regarding the burden of proof on a defense of "good faith." Womack contends in addition that the trial court unlawfully amended the indictment in its instructions to the jury. Musgrave's additional contentions are that he was unlawfully convicted of aiding and abetting a co-defendant whose prior conviction for the same offense was reversed on appeal for insufficient evidence, and that the admission of the opinions of expert government witnesses concerning the values of real estate, being based upon hearsay as to comparable sales and upon records of conveyances not authenticated under 28 U.S.C. 1739, violated his Sixth Amendment right of confrontation. All contentions, other than the last, were fully considered and correctly rejected in the opinion of the court of appeals (see Musgrave Pet. App. 25-29 as to the instruction on burden of proof;[2] *id.* at 37-40 as to amendment of the indict-

instructions to the jury, among other reasons; the conviction of a co-defendant was reversed for insufficient evidence. *United States* v. *Musgrave*, 444 F. 2d 755 (C.A. 5). Womack's conviction was reversed because the trial judge improperly rejected a motion to disqualify himself. *United States* v. *Womack*, 454 F. 2d 1337 (C.A. 5).

[2] In addition to those passages from the instructions cited by the court of appeals (see Musgrave Pet. App. 29), we note that the trial court began its instructions by saying (C.A. App., Vol. IV, p. 1438) (a copy of the appendix in the court of appeals is being lodged with this Court):

> In a criminal case, I must instruct you there is absolutely no obligation for a Defendant to prove his innocence. The

ment; and *id.* at 18-21 as to aiding and abetting), upon which we rely.

The court of appeals also rejected Musgrave's confrontation contention on the authority of its prior *en banc* decision in *United States* v. *Williams*, 447 F. 2d 1285, certiorari denied, 405 U.S. 954 (see Musgrave Pet. App. 30). The panel decision in *Williams* had held that expert testimony based upon records which were

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burden of proving his guilt on any one of the counts in the indictment and the essential elements thereof, beyond a reasonable doubt, rests on the prosecution. That burden never shifts and that burden cannot be sustained unless and until the proof offered by the Government in the case convinces you beyond a reasonable doubt of the guilt of a Defendant * * *.

The trial court concluded the instructions by saying (*id.* at 1478):

> Now, in conclusion and summary, if the Government has established each and all of the essential elements contained and charged in the grand jury indictment beyond a reasonable doubt and all of the essential elements thereof beyond a reasonable doubt, then you should find the Defendant guilty on that particular count in the grand jury indictment * * *.

The court prefaced the passage about which petitioners complain by saying (*id.* at 1475):

> Good faith. If the evidence in the case leaves the jury with a reasonable doubt whether the Defendant acted in good faith and without intent to defraud, then the jury should acquit the Defendant and find him not guilty.

In addition, the court clearly defined the elements of the offenses charged so that the jury was repeatedly told, in effect, that the government had to prove that the defendants acted knowingly, willfully and with specific intent to defraud (*id.* at 1453-1457, 1462-1474). On the basis of the court's charge as a whole, accordingly, we submit that the court of appeals was correct in its conclusion that the trial court's inadvertent phraseology in the passage in question could not have caused the jury to believe that the burden was upon petitioners to prove their good faith beyond a reasonable doubt.

not themselves introduced into evidence violated the confrontation clause (424 F. 2d 344, 346-349); on petition for rehearing, the holding was adhered to by the panel, which cited *California* v. *Green,* 399 U.S. 149, 158, as conclusive authority therefor. 431 F. 2d 1168, 1173-1174. The *en banc* decision, in reversing, held that the panel's reliance upon *Green* was misconceived; it reasoned that an expert witness's use of hearsay as a source for his opinion does not deprive a defendant of the right of confrontation, since the witness is personally available for cross-examination in which both the authenticity and accuracy of his sources and the reasonableness of the use he has made of them in arriving at his opinion may be amply probed. 447 F. 2d at 1289-1290.

Musgrave's contention (Pet. 11) that there is a conflict, arising from "contrary interpretations" of *Green,* between *Williams* and the Sixth Circuit decision in *Phillips* v. *Neil,* 452 F. 2d 337, is without merit. *Phillips* did not involve expert testimony, but rather the admission of medical records in lieu of testimony to rebut an insanity defense, with no opportunity made available to cross-examine the unidentified person whose opinions were reflected on the records. See 452 F. 2d at 340-341.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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